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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SHARP MOUNTAIN COAL COMPANY; D AND R COAL COMPANY, A PARTNERSHIP; AND BOBBY DONOFRIO, APPLICANT	Application for Review Docket No. PENN 80-218-R
v.	Orchard Vein Drift Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	

DECISION

Appearances: Lee Solomon, Esq., Philadelphia, Pennsylvania, for Applicant
Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by Bobby Donofrio in his capacity as partner and owner of D & R Coal Company and Sharp Mountain Coal Company (hereinafter Applicant) under section 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 817(e), (hereinafter the Act) to vacate an order of withdrawal issued by a Federal mine inspector employed by the Mine Safety and Health Administration (hereinafter MSHA) pursuant to section 107(a) of the Act. The parties filed prehearing statements and posthearing briefs. The matter was heard in Philadelphia, Pennsylvania on October 23, 1980.

The order in question was issued on April 8, 1980. This proceeding was filed on May 5, 1980. At no time prior to the date of the hearing did Applicant request that this matter be expedited pursuant to 29 C.F.R. 2700.52. However, at the hearing, Applicant moved to vacate the order of withdrawal for failure to hold a timely hearing. The motion was denied because Applicant failed to move for an expedited hearing pursuant to the Commission's Rules of Procedure.

The controversy in this matter concerns Applicant's use of nonpermissible fuses and blasting caps in its underground anthracite coal mine. MSHA's contention that such use constitutes an imminent danger is disputed by Applicant.

ISSUE

Whether the order of withdrawal due to imminent danger should be affirmed, vacated or modified.

APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. 817(a), provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 3(j) of the Act, 30 U.S.C. 802(j), states: "'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

30 C.F.R. 75.1303 provides as follows:

> Except as provided in this section, in all underground areas of a coal mine only permissible explosives, electric detonators of proper strength, and permissible blasting devices shall be used and all explosives and blasting devices shall be used in a permissible manner.
>
> Permissible explosives shall be fired only with permissible shot firing units.

30 C.F.R. 15.19 provides in pertinent part as follows:

> An explosive certified as permissible under this part is permissible in use only so long as it meets the following requirements: %y(3)4B (d) Is initiated with a copper or copper-based alloy shell, commercial electric detonator (not cap and fuse) of not less than No. 6 strength.

STIPULATIONS

The parties stipulated the following:

1. Sharp Mountain Coal Company is subject to the jurisdiction of the Act.

2. Orchard Vein Drift is a mine within the meaning of the Act.

3. Order No. 225365 was properly served upon Applicant.

4. The Applicant is a small operator.

5. There is no prior history of violations at this mine.

FINDINGS OF FACT

I find from the preponderance of the evidence of record the facts as follows:

1. Orchard Vein Drift Mine, an underground anthracite coal mine, is owned and operated by Applicant.

2. Michael C. Scheib, who issued the order in controversy, was an inspector employed by MSHA and a duly authorized representative of the Secretary of Labor at all times pertinent herein.

3. For approximately 2 years prior to the inspection in controversy, this mine was not inspected by MSHA because of the operator's denial of entry to MSHA inspectors and its unsuccessful litigation to challenge MSHA's authority to inspect this mine.

4. This mine employs no miners and the only persons who work in the mine are the named partners: Bobby Donofrio and Robert Rand. Approximately 50 to 60 tons of coal per week are extracted when the mine is in operation.

5. On March 26, 28, and 31, 1980, Inspector Scheib, accompanied by MSHA Inspector James E. Schoffstall, conducted a regular inspection of this mine. On March 28, 1980, the inspectors found nonpermissible fuses and blasting caps in the working area of this mine.

6. No order or citation was issued on March 28, 1980, concerning the use of nonpermissible fuses and blasting caps.

7. On April 8, 1980, the inspectors returned to the mine and informed Bobby Donofrio that an order of withdrawal due to imminent danger would be issued unless he removed all nonpermissible fuses and blasting caps from the mine.

8. The fuses and blasting caps were not removed from the mine; thereupon, the inspectors issued Order No. 225365 which closed the mine due to an alleged imminent danger. The order further alleged a violation 30 C.F.R. 75.1303.

9. The order has not been terminated and the mine remains closed.

10. At all times relevant herein, Applicant used nonpermissible fuses and blasting caps in the mine.

11. No explosive gas was found in the mine during any of the 4 days in which the inspectors were present, and, hence, the possibility of a methane explosion was unlikely.

12. The possibility that either of the two miners working in this mine would be exposed to death or serious physical harm due to a defective fuse, a stumble and fall, or entering the blasting area without knowledge of the impending blast was unlikely.

DISCUSSION

The order in controversy was issued after the first inspection of this mine following protracted litigation between the parties concerning MSHA's authority to inspect the mine. The undisputed evidence shows that the regular inspection of the mine was conducted on March 26, 28, and 31, 1980. Inspector Schoffstall, testified that he and Inspector Scheib found the nonpermissible fuses and blasting caps in the working area of the mine on March 28. No order or citation was issued at that time. When the inspectors returned to the mine 11 days later on April 8, they informed Bobby Donofrio that no order would be issued if he voluntarily removed the nonpermissible fuses and blasting caps from the mine. He declined to remove them and this order was issued.

The fact that the order in question was issued 11 days after the condition was discovered by the inspectors is strong evidence that the danger was not imminent. The inspectors agree that the condition was no more dangerous on April 8, than it had been on March 28. Inspector Schoffstall testified that although he believed that the use of nonpermissible fuses and blasting caps in the mine constituted an imminent danger on March 28, no order was issued because MSHA wanted "to keep a very workable situation with the operators due to the litigation that he had been going through." Hence, MSHA followed the unusual practice of giving the operator the option to remove the nonpermissible fuses and blasting caps from the mine and thereby avoid a citation or order. Suffice it to say, such conduct by MSHA belies its contention here that an imminent danger existed at the time the order was issued. The definition of imminent danger in section 3(j) of the Act is "any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." [Emphasis supplied.] It should be obvious to MSHA that if the condition or practice in question is such that the operator is given the option to abate it without any sanction from MSHA, the condition or practice could not reasonably be expected to cause death or serious physical harm before it can be abated.

The evidence establishes that an open flame is required to ignite the fuses which lead to the blasting caps in question. One of the reasons given by Inspector Scheib for the issuance of the imminent danger order was that the open flame could ignite methane and cause a premature explosion. However, the inspector conceded that no methane was found in the mine on any of the inspection days in question. While the possibility of a methane accumulation is always present in an underground mine, the total absence of methane in this mine at the time the order was issued requires a finding that any such methane accumulation in the explosive range is only speculative and remote. The inspector's assertions that the use of the fuse and cap method of blasting could cause death or serious physical harm due to a defective fuse, a stumble or fall, or entering the blast area without knowledge of the impending blast are also speculative and remote. In fact, Inspector Scheib admitted that cap and fuse blasting can be done in a safe manner. None of the inspectors testified that the particular method of cap and fuse blasting employed by Bobby Donofrio was unsafe. Their testimony that such a procedure is inherently dangerous is contradicted by Inspector Scheib's admission that such a procedure can be conducted in a safe manner. In conclusion, MSHA has failed to establish the requisite elements of an imminent danger.

In the typical case where an order of withdrawal due to imminent danger is issued, the judgment of the inspector acting under emergency or near-emergency conditions is entitled to great weight in a review proceeding concerning the validity of that order. See Old Ben Coal Company v. IBMA, 523 F.2d 25, 31 (7th Cir. 1975). This rationale is inapplicable to matters like the instant one where the inspector waits for a period of 11 days after discovery of an alleged imminent danger before issuing the order. However, MSHA argues that the instant case is analogous to Itmann Coal Company, Docket No. WEVA 80-7-R, June 26, 1980, where I upheld an imminent danger order of withdrawal. In Itmann Coal Company, supra, the facts were that the MSHA inspector observed a miner travelling under unsupported roof and issued an order of withdrawal. While the miner in question was no longer under the unsupported roof at the time the order was issued, the order was affirmed because the evidence established that it was the practice of miners to travel under this unsupported roof and that the practice could reasonably be expected to cause death or serious physical harm before it could be abated. The order in that case was issued moments after the occurrence. Itmann Coal Company, supra, is distinguishable from the instant case because here MSHA has failed to establish that the danger was imminent. This is so because of the passage of 11 days from the time the condition or practice was discovered and the time the order was issued and the fact that MSHA gave the Applicant the option of abating the violation without any sanction.

The foregoing should not be construed as an approval of fuse and cap blasting in underground mines or a determination that such a practice can not constitute an imminent danger under the Act. Fuse and cap blasting is prohibited in underground coal mines persuant to 30 C.F.R. 75.1303. Such blasting can be

prevented by MSHA's use of citations, orders, and civil penalties. However, under the peculiar facts of this case, I find that MSHA has failed to establish that an imminent danger existed at the time the order was issued.

Nevertheless, Applicant admittedly used fuse and cap blasting in this mine in contravention of 30 C.F.R 75.1303. The proper procedure for MSHA to follow in this matter, where the inspectors discovered the violation 11 days before taking action on it, was to issue a citation pursuant to section 104(a) and set a reasonable termination due date. If the citation was not abated within the time allotted, the mine could have been closed by an order pursuant to section 104(b) for failure to abate a violation. Under the facts of the instant case, the determination to issue an imminent danger order of withdrawal was improper. Therefore, the application for review is granted in part and the document issued as Order No. 225365 is modified to a citation pursuant to section 104(a) of the Act, and that citation is affirmed. The above document is further modified to show that the termination due date shall be 8 a.m. on the 41st day following the issuance of this decision.

In the application for review, the request for relief included a claim for an award of attorney's fees and costs. Applicant appears to have abandoned that request since it was not mentioned in its closing argument or brief. In any event, the Act does not provide for such an award in these proceedings but does allow for such relief in actions for discrimination or discharge pursuant to section 105(c) of the Act. Since there is no authority for the award of attorney's fees and costs in this action, that request is denied.

In MSHA's posthearing brief, it requests the assessment of a civil penalty in the amount of $2,000 although its assessment office has proposed a civil penalty of only $275. MSHA has not filed a civil penalty proceeding with the Commission on this matter. The operator has not consented to the assessment of a civil penalty in this proceeding. I find that the operator has the right to pursue its other administrative remedies in this case and I will not assess a civil penalty at this time. However, the parties are directed to notify me promptly of the filing of any civil penalty proceeding arising out of this matter.

CONCLUSIONS OF LAW

1. I have jurisdiction over this matter pursuant to section 107 of the Act.

2. The inspector improperly issued the subject order of withdrawal pursuant to section 107(a) of the Act because no imminent danger existed in that there was no reasonable expectation that the use of nonpermissible fuses and blasting caps could cause death or serious physical harm before such condition or practice could be abated.

3. The use of nonpermissible fuses and blasting caps in the mine was a violation of 30 C.F.R. 75.1303.

4. The application for review is granted in part and the order in question is modified as follows: (A) The order of

withdrawal due to imminent danger pursuant to section 107(a) of the Act is modified to a citation pursuant to section 104(a) of the Act alleging a violation of the statutory

provision contained in 30 C.F.R. 75.1303; and (B) the termination due date on the document in question is modified to be 8 a.m. on the 41st day following the date this decision is issued.

5. Applicant is not entitled to an award of attorney's fees or reimbursement for other costs incurred in connection with this proceeding.

ORDER

THEREFORE, IT IS ORDERED that the application for review is GRANTED in part in that the subject withdrawal order is MODIFIED to a citation pursuant to section 104(a) of the Act and said citation is AFFIRMED.

IT IS FURTHER ORDERED that the termination due date on the above citation shall be MODIFIED to 8 a.m., on the 41st day following the issuance of this decision.

IT IS FURTHER ORDERED that Applicant's request for an award of attorney's fees and costs is DENIED.

James A. Laurenson Judge